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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 158.

HENRY W. BOARDMAN, SURVIVING PARTNER OF THE FIRM OF WILLIAM H. ABEL & COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN J. TOFFEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED NOVEMBER 1, 1882.

L. 0502 [illegible]

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of New Jersey, Greeting:

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

Because in the record and proceedings, and also in the giving of the judgment in a plaint which was in the said circuit court before you, or some of you, between Henry W. Boardman, surviving partner of the firm of Wm. H. Abel & Co., plaintiff, and John J. Toffey, defendant, manifest error hath intervened, to the great damage of the said Henry W. Boardman, as by his complaint appears:.

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the first day of August, in the year of our Lord one thousand eight hundred and eighty-two.

S. D. OLIPHANT, *Clerk.*

Allowed. JNO. T. NIXON, *J.*

[Endorsed:] U. S. circuit court, district of N. J. Henry W. Boardman, surviving partner, &c., *vs.* John J. Toffey. In trover. Writ of error. James B. Vredenburgh, att'y. Filed August 1, 1882. S. D. Oliphant, clerk.

2 UNITED STATES OF AMERICA, *ss:*

To John J. Toffey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Jersey, wherein Henry W. Boardman, surviving partner of the firm of Wm. H. Abel & Co., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of August, eighteen hundred and eighty-two.

JNO. T. NIXON, *J.*

2½ [Endorsed:] U. S. circuit court, district of N. J. Henry W. Boardman, surviving partner, &c., *vs.* John J. Toffey. In trover. Citation. James B. Vredenburgh, att'y. Service of within citation upon the defendant, John J. Toffey, is acknowledged the 2d day of August, A. D. 1882. Preston Stevenson, att'y def't.

3 *Judgment on Verdict.*

United States Circuit Court, District of New Jersey. In Trover.

HENRY W. BOARDMAN, Surviving Partner of the Firm of William H. Abel & Co.,

vs.

JOHN J. TOFFEY.

James B. Vredenburgh, attorney.

As yet of the second day of February, in the year of our Lord eighteen hundred and eighty-two.

JOHN T. NIXON,
District Judge.

Witness:
S. D. OLIPHANT, *Clerk.*

DISTRICT OF NEW JERSEY, *Hudson County,* } *ss:*

John J. Toffey, the defendant in this suit, was summoned to answer unto William H. Abel and Henry W. Boardman, partners, trading as Wm. H. Abel & Co., the plaintiff therein, of a plea of trespass on the case.

And thereupon the said plaintiffs, by James B. Vredenburgh, their attorney, complain for that whereas the said plaintiffs heretofore, to wit, on the seventh day of January, in the year one thousand eight hundred and eighty-two, to wit, at Jersey City, in the county of Hudson aforesaid, were lawfully possessed as of their own property of certain goods and chattels, to wit, twenty-one machines used and employed to do knitting work, and known as Abel ma-

4 chines, and described and numbered as follows, that is to say, one legger, numbered two hundred and seventy-nine; one gussetter, numbered two hundred and eighty; one legger, numbered two hundred and eighty-one; one footer, numbered two hundred and eighty-two; one footer, numbered two hundred and eighty-three; one heeler, numbered two hundred and eighty-four; one legger, numbered two hundred and eighty-seven; one gussetter, numbered two hundred and eighty-eight; one legger, numbered two hundred and eighty-nine; one legger, numbered two hundred and ninety; one legger, numbered two hundred and ninety-one; one heeler, numbered three hundred and thirty-one; one footer, numbered three hundred and thirty-three; one footer, numbered three hundred and thirty-four; one footer, numbered three hundred and forty-one; one footer, numbered three hundred and forty-three; one footer, numbered three hundred and forty-seven; one footer,

numbered three hundred and fifty; one footer, numbered three hundred and fifty-five; one footer, numbered three hundred and fifty-six; one footer, numbered three hundred and sixty-one, of great value, to wit, of the value of thirty thousand dollars lawful money of the United States of America.

And being so possessed the said plaintiffs afterwards, to wit, on the day and year above mentioned, to wit, at Jersey City aforesaid, casually lost the said goods and chattels out of their possession, and the same afterwards, to wit, on the day and year aforesaid, to wit, at Jersey City aforesaid, came to the possession of the said defendant by finding.

Yet the said defendant, well knowing the said goods and chattels to be the property of the said plaintiffs, and of right to belong and appertain unto them, but contriving and subtly to
5 deceive and defraud the said plaintiffs in the behalf, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said plaintiffs, although often requested so to do, and hath hitherto wholly refused so to do, and afterwards, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid, converted and disposed of the said goods and chattels to his own use.

And for that whereas also the said plaintiffs heretofore, to wit, on the seventh day of January, in the year eighteen hundred and eighty-two, to wit, at Jersey City aforesaid, were lawfully possessed as of their property of certain other goods and chattels of like number, quantity, quality, description, and value as those in the said first count mentioned; and being so possessed the said plaintiffs afterwards, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid, casually lost the said goods and chattels out of their possession, and the same afterwards, to wit, on the day and year last aforesaid, to wit, at Jersey City *afterwards*, came to the possession of the said defendant by finding; yet the said defendant, well knowing *that* the said goods and chattels to be the property of the said plaintiffs and of right to belong and appertain unto them, but contriving and fraudulently intending craftily and subtly to deceive and defraud said plaintiffs in this behalf, hath not as yet delivered the said goods and chattels or any or either of them or any part thereof to the said plaintiffs, although often requested so to do, and hath hitherto wholly refused so to do, and afterwards, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid, converted and disposed of the said goods and chattels to his
6 own use.

Wherefore the said plaintiffs say they are injured and have sustained damage to the amount of thirty thousand dollars, and therefore they bring their suit, &c.

And the said defendant, by Preston Stevenson, his attorney, comes and defends the wrong and injury when, &c., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him.

And of this he, the said defendant, puts himself upon the country, &c.

And the said plaintiff doth the like.

Afterwards, to wit, on the twenty-fifth day of May, in the year eighteen hundred and eighty-two, the parties aforesaid, by their attorneys aforesaid, waived a jury for the trial of the issues in above cause by stipulation in writing then filed with the clerk of said court, of which the following is a copy:

7 (*Waiver of Jury.*)

United States Circuit Court, District of New Jersey. In Case.

WILLIAM H. ABEL *et al.*, Pl'tffs, *vs.* JOHN J. TOFFEY, Def't.

The cause being called for trial regularly, and the respective parties, plaintiffs and defendant, waiving a jury and agreeing in open court to proceed to trial before the court without a jury, it is ordered by the court that the trial of this cause do proceed without a jury.

By the court:

Attest: S. D. OLIPHANT, *Clerk.*

We consent to the above order being entered, and that the issues of fact be tried by the court.

May 25, 1882.

JAMES B. VREDENBURGH,
Attorney of Plaintiffs.
PRESTON STEVENSON,
Def'd't's Attorney.

(Endorsed:) U. S. circuit court, dist. of New Jersey. Wm. H. Abel & *al. vs.* John J. Toffey. In case. Order & consent. Jas. B. Vredenbugh, pl'tffs' att'y Filed May 25, 1882. S. D. Oliphant, clerk.

8 Afterwards, that is to say, on the twenty-fifth day of May, in the year eighteen hundred and eighty-two, in the term of March, eighteen hundred and eighty-two, before the Honorable John T. Nixon, one of the judges of the said circuit court, at Trenton, in said circuit, came as well the within-named plaintiff as the within-named defendant, by their respective attorneys within named, and produced before the said judge their respective witnesses, documents, and proofs upon the said issues; and the said court, having heard the same, and the argument of counsel thereon, retains the cause for advisement until the twenty-eighth day of July, eighteen hundred and eighty-two, on which day the following finding of facts was made and filed by the court as the result of the evidence offered upon the trial of said issues:

Circuit Court of the United States for the District of New Jersey.

At a stated term of this court, held at the court-rooms, in the city of Trenton, on the twenty-eighth day of July, in the year A. D. 1882.

9 Present: Hon. John T. Nixon, district judge.

HENRY W. BOARDMAN, Plaintiff, *vs.* JOHN J. TOFFEY, Defendant.

This cause having come on to be tried at the present term of court, and the decease since the commencement of this action of William H. Abel, one of the plaintiffs, having been duly suggested upon the record, and an order made that the action be continued in the name of Henry W. Boardman, the surviving plaintiff, and the attorneys for the respective parties having first filed with the clerk of the court a stipulation in writing in due form, and pursuant to the statute in such case made and provided, waiving a trial by jury in the cause; and the court having thereupon heard the evidence on behalf of the plaintiff and of the defendant respectively, and counsel for each party having been duly heard and due consideration had by the court:

10 The court does find, decide, and adjudge, upon the pleadings and evidence in the cause, that the said defendant, John J. Toffey, is not guilty of the trespasses alleged against him in the declaration, or any of them, and that the said plaintiff, Henry W. Boardman, take nothing by the said suit; and that the said defendant do have judgment in this action upon the merits thereof against the said plaintiff, including his costs to be taxed by the clerk.

JNO. T. NIXON, *J.*

To which finding of the judge the plaintiff prayed an exception, and his honor the judge sealed the exception accordingly.

JNO. T. NIXON, *J.* [L. S.]

And at the term aforesaid, upon the day aforesaid, it is, upon the said facts found as aforesaid by the said court, considered that the said Henry W. Boardman, surviving partner of the firm of William H. Abel and Company, take nothing by his said writ, but that he and his pledges to prosecute be in mercy, &c., and that the said John J. Toffey do go thereof without day, &c.

11 And it is further considered by the court here that the said John J. Toffey do recover against the said Henry W. Boardman, surviving partner as aforesaid, seventy-five dollars and seven cents, for his costs and charges by him about his defence in this behalf laid out and expended, by the court here adjudged to the said John J. Toffey, and with his assent, according to the form of the statute in such case made and provided, and that the said John J. Toffey have execution thereof, &c.

JNO. T. NIXON, *J.*

Judgment signed this twenty-eighth day of July, A. D. 1882.

12 *State of Case.*

United States Circuit Court, District of New Jersey. In Trover.

HENRY W. BOARDMAN, Surviving Partner, &c., *vs.* JOHN J. TOFFEY.

MAY 26, 1882.

The plaintiff opens the case and calls HENRY W. BOARDMAN, sworn:

Am one of the original plaintiffs and surviving partner of the firm of Wm. H. Abel & Co., Laconia, New Hampshire. Wm. H. Abel, the other member of the firm, died a few weeks ago. Our firm and James T. Minchin made a contract September 25th, 1880, at our place of business, Laconia, New Hampshire, for the sale and delivery of certain patent knitting machines. This is the agreement (put in evidence, marked —). Mr. Minchin came to us and said he was to have one of the floors in the factory of the New York Silk Manufacturing Company, at Marion, in the State of New Jersey, to
13 carry on the knitting business for his own account. We shipped Mr. Minchin, from time to time, 20 of these machines. The annexed list, marked "B," shows the date of the several shipments of machines. The last machine, making 21, shipped June 17, was sent direct to the New York Silk Manufacturing Company, at Marion. We owned the patents for those machines. The price was $500 each. They were worth that, and we never sold any for less. We could not fill our orders, and the demand was continuous. We controlled the market for them. I saw and identified each of the twenty-one machines sued for and shipped in the possession of John J. Toffey, the defendant, at the mill in Marion, under attachment issued to him. I recognized them as the same machines we had shipped to Minchin and the Silk Company. This was on the 10th and 11th of January, 1882. Minchin sent us his notes,
14 from time to time, on account of the machines shipped, endorsed by the New York Silk Manufacturing Company. These notes were for about the amount due us at the time, as near as we could tell. He did not send the notes immediately after a machine was shipped, but from time to time on account. The notes were not all paid; several of them were renewed. The amount of notes for the machines remaining unpaid I cannot exactly state, as I have no memorandum with me. They amount to over $9,000 not paid. They are long past due. I can procure the facts from my books at home, at Laconia. I saw Mr. Harris, the treasurer of the Silk Company, about June 15, 1881. He said, among other things, that Minchin had failed to meet his notes, and that the Silk Company was considering about taking the hosiery business off his hands.

At that time I had the agreement with me, and I supposed he knew all about it; I did not show it to him or tell him that I had it.

Cross-examination:

15 I think that about $5,000 of the notes given by Minchin for the machines were paid; I never insured the machines;

I never informed Mr. Harris, the company's treasurer, that I had made this agreement with Minchin; I cannot say of my own knowledge but that he was in entire ignorance of it. After the first note which was protested came due I saw Mr. Harris several times at the office of the Silk Company in New York; I never informed Mr. Harris of the agreement with Minchin; I supposed he knew it; I had the agreement with me at the time some of Minchin's notes were renewed by Mr. Harris, but did not show it to him; the notes were renewed by notes of the New York Silk Company; we received Minchin's note for all machines shipped to him; so far as I know the New York Silk Company had no knowledge of our agreement with Minchin, although I supposed they had.

JUNE 6TH, 1882.

16 HENRY W. BOARDMAN, being recalled for plaintiff, says:

I have now a memorandum of all the notes given and paid, as well as those remaining unpaid. We received from Minchin the following seventeen notes:

Note dated	Oct.	9, '80,	3 mos.	$625
"	"	19, '*78*,	"	625
"	Nov.	20, '80,	6 mos.	650
"	"	"	"	650
"	Dec.	11, '80,	"	550
"	"	"	"	550
"	"	"	"	550
Note dated	Dec.	23, '80,	6 mos.	500
"	Jan.	5, '81,	"	500
"	"	8, '81,	"	241 20
"	"	8, '81,	"	200
"	Apr.	4, '81,	3 mos.	550
"	"	5, '81,	"	550
"	"	6, '81,	"	550
"	May	2, '81,	"	525
"	"	4, '81,	"	525
"	"	" '81,	"	525
Note dated	Apr.	5, '81,	6 mos.	$1,522 03
"	"	10, '81,	"	1,522 03
"	"	12, '81,	"	1,522 05
17 "	June	29, '81,	4 mos.	500
"	Aug.	12, '81,	4 "	578 09
"	"	"	4 "	578 10

The last six notes were made and delivered to us by the New York Silk Manufacturing Company. The others were Minchin's notes, endorsed by the company. The three large notes of the Silk Company, amounting to $4,566.11, were given by Mr. Harris for the New York Silk Company, on the 15th of June, to renew, as I understand it, certain of the Minchin notes coming due. The Minchin notes paid were those mentioned in the list, as follows, viz., Oct. 9, 19, '80; Nov. 20, 20, '80; December 11, 11, 11, '80; May 2, 4, 11, '81;

the whole aggregating $5,775. The notes renewed were those of Dec. 23, '80; Jan. 5, 8, & 8, '81; April 4, 5, 6, '81; aggregating $3,091.20.

These latter notes were never paid, but were extended, as already stated, by other notes given by the New York Silk Company, the endorser on Minchin's notes. I had agreed with Minchin to extend
18 a sufficient number of his notes to accord with the agreement, as he gave me 3 & 6 months' notes so as to be more easily discounted. The money was obtained on the three notes mentioned on the list for $1,522.03, $1,522.03, and $1,522.05, to take up the six Minchin notes, amounting to $3,091.20. The three notes were endorsed by Abel & Company, and were used to raise money to take up the Minchin notes by the N. Y. Silk Co. made by our firm after June 15, 1881. I arranged to discount the three notes of the Silk Company by sending to a friend of mine, a Mr. Colby, of 22 Nassau street, New York city. He came to No. 70 Greene street, the office of the company, and took the notes and procured them to be discounted. He sent Abel & Co. a check for the amount less the discount and his commissions. Abel & Co. collected the money and sent the balance to Mr. Harris, after deducting payment of one note of Minchin's, held by Hill, Clark & Co., past due, and other
19 items. The letter of June 22, 1881, from Abel & Company to Harris contained the balance sent and a statement of the matter. At the time the arrangement was made respecting the three notes for $1,522.03, Mr. Harris said that he had been talking with Minchin about the company buying Minchin's hosiery business, and asked what I thought of it. I said it was a good business if well managed. He also asked me what they could do with our company in case the Silk Company bought Minchin's business. I said, "We will do with you the same as we have with Minchin," when he said that that would be perfectly satisfactory; he couldn't expect anything better. No reference was made about these machines or about the company having any interest in them or claiming any, and we never made any conveyance of them to the company. I never had any idea or intimation that the New York Silk Company was or claimed to be interested in any way in the hosiery business until Mr. Harris testified to that effect in this case.

To the court.

20 The statement in the letter of June 22, 1881, "to square up our account with Minchin and open new with the N. Y. Silk M'f'g Co.," meant that we would balance up this account on our ledger, assuming that the notes would be paid at maturity by Minchin or the Silk Co. The making, receiving, and procuring discount of the three notes of the Silk Company for $1,522.03 was never intended by me to make any new deal, or substitute any other party, or in any way to change the written agreement with Minchin, or to pass any title to the machines, or divest Abel & Co. of their property in all of said machines. The total or gross amount ever received from any or all sources on said 21 machines was $5,775, and this was so received by the first ten notes being paid as testified to by

me; the next seven notes were extended by the three notes of $1,522.03 each, and the last six notes, including these three of $1,522.03 each, were never paid. This is my understanding
21 of the matter. The two lists marked "C" and "D" show the discounts paid on notes and the dates when paid, and the additional parts to machinery, and the repairs and the dates when charged.

Cross-examination:

The ten outstanding Michigan notes, amounting to $3,091.20, were not surrendered up to the New York Silk Company when the discount of the three notes of $1,522.03 each was effected on June 15, 1881. They were outstanding at the time. We had discounted them or put them in bank for collection. We never had them again after they were out of our hands. So far as we know they were paid at maturity; I don't know who paid them, but we received the value of them by discount or collection. The note of June 29, 1881, for $500, at four months, was given by the Silk Company, I presume, on account of the last machine shipped to them on June 17. I don't know of anything else it could have been given for. When Mr. Harris spoke of the Silk Company taking the hosiery busi-
22 ness, and the terms on which Abel & Co. would deal with them, I did not tell him of the agreement with Minchin, nor did I state to him the terms on which Abel & Co. had shipped the machines to Minchin. At this same time Mr. Harris wanted to know how our account stood with Mr. Minchin. I promised to send him the account, which I did subsequently.

It is admitted by both parties that the notice and demand offered in evidence by plaintiff was served on defendant on the tenth day of January, 1882, and that said defendant refused to deliver the machines therein mentioned to the plaintiffs; that the machines mentioned in the declaration and in said notice were then and have been at all times since the 3rd day of October, 1881, in the possession of the defendant, as sheriff of the county of Hudson, New Jersey, under and by virtue of certain writs of foreign attachment
23 duly issued out of the circuit court of said county against the New York Silk Manufacturing Company at the suit of the Second National Bank of Paterson, New Jersey, the said plaintiff in attachment being a *bona fide* creditor of said Silk Company, and without notice of any claim of the plaintiffs herein, or either of them, against or to said machines.

JAMES B. VREDENBURGH,
Pl'ff's Attorney.
PRESTON STEVENSON,
Defendant's Attorney.

To John J. Toffey, late sheriff of the county of Hudson, and the Second National Bank of Paterson, New Jersey:

Take notice that we hereby demand of you immediately to be put

in possession of the following goods and chattels owned by us and now illegally detained by you:

Twenty-one machines, known as "Abel Machines," described and numbered as follows:

One legger,	numbered	279.
" gussetter,	"	280.
24 " legger,	"	281.
" footer,	"	282.
" "	"	283.
" heeler,	"	284.
" legger,	"	287.
" gussetter,	"	288.
" legger,	"	289.
" "	"	290.
" "	"	291.
" heeler,	"	331.
" footer,	"	333.
" "	"	334.
" "	"	341.
" "	"	343.
" "	"	347.
" "	"	350.
One footer,	numbered	355.
" "	"	356.
" "	"	361.

Which machines are in the building now or late occupied by the New York Silk Manufacturing Company in Jersey City, New Jersey.

Dated January 10, 1882.

WILLIAM H. ABEL & CO.,
By JAMES B. VREDENBURGH,
Attorney.

25 ERNEST GOURD, a witness, being called for plaintiffs, being sworn, says:

I am acquainted with the machines in question; have bought and sold them; know their market value; have examined these machines, and in my judgment their market value on January 11, 1882, was five hundred dollars each.

WM. J. HARRIS, a witness called on behalf of the def'ts, being duly sworn, testified as follows:

I was treasurer and director of the New York Silk Man. Co. from 1877 to September or October, 1881. The company at first was manufacturing silk goods. James T. Minchin was a stockholder in the company, a director, and the superintendent of the factory. He had the entire charge of the manufacturing department of the business of the company. In 1880, about September, we concluded to go into the manufacture of woolen hosiery and to use the Abel machines. Minchin said they were hard to get, as Abel & Co.
26 had more orders than they could fill, but as he had done con-

siderable business with them, and they were very friendly with him, he could get the machines much quicker and on better terms if he bought them in his own name. It was agreed that this would be best, and we sent him to buy the machines. Minchin went on and made the contract for the machines. When he returned he told me he arranged for them in his own name, and had to pay for them in three, six, nine, and twelve months, by giving his own paper endorsed by the Silk Company. I never knew of the written agreement between Minchin and Abel & Co., put in evidence by plaintiffs, until after the failure of the Silk Company in Sept., 1881, and Minchin had no authority from the company to make it. We considered Mr. Minchin, as a manufacturer, the best man to start and manage the hosiery business, and that he probably knew what he could do to the best advantage with Abel & Co. He had as much interest in the Co. as any one, and I felt that was inducement
27 enough to cause him to do the best he could for the company. He was authorized to purchase the machines for the company. The company endorsed the notes that Minchin gave Abel & Co. for the machines. I endorsed the notes and filled in the amounts and left the rest for Mr. Minchin to fill out, which he did. Many of these notes went to protest from time to time. A number of them were coming due about June 15th, close together. We had much trouble in keeping track of the notes, as they matured at times unknown to us and were protested. In order to protect ourselves from these troubles made by Minchin we determined to take the hosiery business into our own hands—the Silk Company—and so informed Mr. Boardman in our office. He said that his firm would be satisfied with that, and he thought he could assist us in raising money with notes of the company to take up the outstanding Minchin notes as they fell due. I made out the three notes of the company for $1,522.03 each, and Mr. Boardman sent for a Mr. Colby, a note broker, who took the notes and discounted or
28 sold them and sent a check for the proceeds to Abel & Co., who took out some payments, one note, I think, which had been protested and sent back to them, and then sent to me the balance, which I deposited to the credit of the company, and as fast as the Minchin notes became due I drew checks and paid them. I think the amount of the Minchin notes thus provided for was about $3,000. I cannot state exactly how much. I do not think Abel & Co. ever had the three notes of the Silk Co. in their possession. I gave them to Mr. Colby or sent them to him myself. The proceeds of their sale were not held and expressly applied to the payment of the Minchin notes as they fell due, but we used the money for the company's purposes, and the Minchin notes were paid as they matured out of the general funds of the company. These three notes were made at or about the time of my conversation with Mr. Boardman, referred to above, and were all payable six months after date. I never knew that Abel & Co. claimed to have title or lien on
29 the machines until after the failure of the company, in Sept., 1881, when they put in such claim. The notes given by Minchin were all paid or taken up by the Silk Company. The com-

pany ordered one machine from Abel & Co. after the 15 of June, 1881. I presume we gave our note for it. The company's note of June 29, 1881, I suppose was given for that machine. The two other notes, given to Abel & Co. in August following, for $578.09 and $578.10, were given in compromise and settlement of a large bill which Abel & Co. had rendered for alterations to the machines, amounting to about $2,750. I disputed this bill, as I understood we were to pay only $100 on each machine charged, and only eleven were charged. Abel & Co. agreed to accept these two notes in payment of the claim, and were supposed to be in payment and settlement of the entire balance of the account with Abel & Co. at that time. I said nothing to Mr. Boardman about buying Minchin's business and the machines. I did say to him that the com-
30 pany was dissatisfied with the way Minchin had managed the business, and that we were going to take the whole charge ourselves. Mr. Boardman never said to me that they would deal with the company on the same terms they had with Minchin. I told him the company were going to take the whole business in hand and would attend to paying Minchin's notes at maturity, as we had so much trouble with their going to protest. The three notes were not discounted with any pledge that the money was to be specifically used to pay Minchin's notes, but as an accommodation to the company, to enable it to pay them as they became due. Nothing was said about renewing Minchin's notes. The company was to pay them without renewal. Mr. Minchin had nothing to do with the arrangement to get the money on our notes; he was not present, and the arrangement was between Mr. Boardman and myself.

And, being cross-examined, further said:

I received the letter of Oct. 12th, also the two accounts
31 shown me. The company printed in its letter-head the name of Minchin, as superintendent, with the other officers of the company, and sent these letters out to the public, including such as I wrote to Boardman and Abel & Co. on. Several of the Minchin notes coming due were covered or included in the three notes for $1,522.03 each, and these were made and discounted partly to enable us to take up the Minchin notes coming due at that time. I never promised to buy these machines of Minchin—no recollection that I ever did. I never let Mr. Broadman or Abel & Co. know that Minchin's statements were false. I gave no authority to Minchin to make the written agreement with Abel & Co., and he had no authority from the company to make it. Minchin told me that he gave Abel & Co. to understand that he personally was going to carry on the hosiery business. He told me this after he ordered the machines, but before any were received or about that time. I know Abel &
Co. supposed that Minchin was the only one interested in the
32 hosiery business, because Mr. Boardman in several talks with me indicated that such was their understanding. I did not correct that impression, as I did not think it my business to inform him differently. It was about the time the three notes for $1,522.03 each were made that I told Mr. Boardman that the company thought of taking the hosiery business and carrying it on themselves.

HENRY W. BOARDMAN, recalled for plaintiff, says:

I never had any idea or intimation that said company claimed to be in any way interested in the hosiery business until Mr. Harris testified to that effect in this case. That all of said 21 machines were of the kind referred to in said written agreement as being $500 each. The parts sent as additions were to increase the capacity of the machines to make their gauge interchangeable. Ten or eleven machines could not be worked to a profit, and would only make samples to take orders from, and it required many machines
33 to work to any profit and advantage to make the different sizes, styles, kinds, &c. The said agreement contemplated furnishing a great many machines from time to time, under the terms of it. Nothing was ever said to or by either Minchin or Harris about said machines belonging to or being sold to the said company, or that said company had any interest or property therein. No directions were ever given by Harris or the company or any one as to how the proceeds of said notes should be applied, excepting as to the seven notes aggregating $3,091.20, as indicated by the letter of June 22, '81.

To the court.

In the letter of June 22, '81, where it says, "this will square our account with Minchin, and we will open a new one with you," means that we would balance up this account on our ledger, assuming that the notes would be paid at maturity by Minchin or said company. After the failure of the company I called on Mr. Harris, who arranged with me to try to sell all the carding and spinning
34 for them to the same party who would buy the twenty-one machines. I agreed to help him in this way, but soon received word from Philadelphia that Mr. Harris or some one was offering the machines quietly for sale. I at once wrote to Mr. Harris the letter, a copy of which is in this case, warning him about his making any such effort; he made no reply to this. Whatever charges were made against the Silk Company on our ledger were first made to Minchin in the regular course of our business on our blotters or day-book. To make all the sizes and kinds of stockings required to be made for a successful business would necessitate a large number of such machines. On June 15, Mr. Harris said if Minchin would tell him about his business, and let him attend to his notes and accounts for him, he could make it much easier for Minchin, and safer for all. The $241.20 and $200 notes were made so that Abel & Co. might more easily get them discounted. The total
35 or gross amount ever received from any and all sources on said 21 machines was $5,775, and this was so received by the first ten notes being paid. The next seven notes were extended by the three of $1,522.03 each, and the last six notes, including these three of $1,522.03 each, were never paid.

(Agreement referred to offered in evidence.)

Plaintiffs' counsel offers in evidence:

(1.) Letter, J. T. Minchin to H. W. Boardman, dated November 13, 1880.

(2.) Letter, same to same, dated Apr. 11, 1881.
(3.) Letter, J. T. Minchin to Abel & Co., Apr. 27, 1881.
(4.) Letter, H. W. Boardman to W. J. Harris, June 22, '81.
(5.) Letter, W. J. Harris to H. W. Boardman, June 22, '81.
(6.) Same to same, June 29, 1881.
(7.) Same to same, Aug. 6, '81.
(8.) W. H. Abel & Co. to W. J. Harris, Oct. 12, 1881.
(9.) Same to same, Aug. 9, '81.

Plaintiffs thereupon ask the witness, Henry W. Boardman, the following question:

"Had you any idea that by accepting these notes you parted
36 with the title to your property, these machines in question?"

Whereupon counsel for defendant interposed and insisted that said evidence so to be given was not good or admissible in law upon the issue aforesaid, and his honor so held and excluded the question. To which ruling plaintiffs' counsel asked an exception, and his honor allowed the exception, and it was sealed accordingly.

JNO. T. NIXON, *J.* [L. S.]

And plaintiffs' counsel further asked said witness: "Did Mr. Harris, by any expression or action on his part, lead you to understand that he understood that by taking these notes you parted with the title to your property?"

Whereupon counsel for defendant interposed, and insisted that said evidence so offered was not good or admissible on the issue aforesaid, and the court so held and excluded the question.

To which ruling plaintiffs asked an exception, which his honor allowed, and the same was sealed accordingly.

JNO. T. NIXON, *J.* [L. S.]

37 The case being closed plaintiffs' counsel requested the court to find as a question of fact:

That James T. Minchin had authority from the New York Silk Company as their agent, and did within the scope of his authority as their agent enter into said contract with said plaintiffs, and that the New York Silk Company was bound by said contract.

Which request his honor refused and declined to find.

Whereupon the counsel for plaintiffs asked an exception, which his honor allowed, find the same was sealed accordingly.

JNO. T. NIXON, *J.* [L. S.]

The counsel for plaintiffs requested the court to find as a question of law:

That said Abel & Co. did not waive the conditions of the contract and did not waive their right to reclaim said machines.

Which request his honor refused and declined to find.

Whereupon the plaintiffs prayed an exception, which his honor allowed, and the same was sealed accordingly.

JOHN T. NIXON, *J.* [L. S.]

38 And the counsel for plaintiffs requested the court to find as a question of law:

That said plaintiffs had not by any act or neglect on their part estopped themselves from asserting their right to reclaim said machines.

Which request his honor refused and declined to find.

Whereupon the plaintiffs prayed an exception, which his honor allowed, and the same was sealed accordingly.

JNO. T. NIXON, *J.* [L. S.]

And the counsel for the plaintiffs requested the court to find as a question of law:

That the said New York Silk Company and James T. Minchin had not complied with the requirements of said contract in paying for said machines, and that the title to the same remained in and did not pass from the plaintiffs.

Which request the court refused and declined to find.

Wherefore plaintiffs prayed an exception, which *and* his honor allowed the same, which was sealed accordingly.

JNO. T. NIXON, *J.* [L. S.]

39 *Agreement.*

This agreement, made, executed, and entered into on this twenty-fifth day of September, 1880, by and between Wm. H. Abel & Co., of Laconia, N. H., parties of the first part, and James T. Minchin, now of Jersey City, New Jersey, party of the second part, witnesseth:

First. The said Abel & Co., for and in consideration of and subject to the promises, agreements, undertakings, and stipulations of said Minchin hereinafter named, hereby agree to make for and furnish to said Minchin such knitting machinery as they make and as he may need in the manufacture of hosiery at Marion, New Jersey, for the following price-, to wit, for all fashion and fancy machines, $500 each; for all plain half-hose machines, $200 each; for all half-hose machines with two colors, $225 each; for all plain tibb machines, $200 each; said machines to be furnished from time to time as said Minchin may desire and order.

Second. The said Minchin agrees to pay for said machines as follows, to wit, one-fourth in three months from delivery, one-fourth in six months from delivery, one-fourth in nine months from delivery, and the remaining one-fourth in twelve months from
40 delivery, with interest as hereinafter stated; and said Minchin further promises and agrees that on the delivery of each machine he will send to said Abel & Co. his notes properly indorsed by the New York Silk Manufacturing Company, a corporation doing business in New York city, upon such time as is hereinafter indicated.

Third. It is further understood and agreed by the parties hereto that said notes are to be made by said Minchin and received and used by said Abel & Co. for the accommodation of Minchin upon the following stipulation and agreement only, to wit, said Abel & Co. are to have said notes discounted at the most favorable rates they can, and are to retain the proceeds thereof for their own use. Said Minchin is to pay whatever discount is made on said notes,

not to exceed ten per cent. per annum, it being understood and agreed that said notes are not to be received by said Abel and Co., and are not to be considered by either party as in any way or degree paying for said machines unless and until all of said notes are fully paid together, with any and all discounts, interest, and
41 expenses attending or growing out of them or any of them.

Fourth. It is further understood and agreed that all of said machines are to be and remain the sole property of Abel & Co. until all are fully paid for in money. Said Minchin is not to have or acquire any title or interest in them or any of them, either legal or equitable; and that in case said Minchin shall fail to pay for said machines as and at the times above stipulated, said Abel & Co. shall have the right to and may without notice take and remove said machines and dispose of them as they may see fit, and without accounting to said Minchin for any payments he may have made thereon or being in any way liable to him for said payments or for removing said machines; and if at any time said machines are attached or any attempt is made by any creditor of said Minchin to take or acquire any lien thereon, said Abel & Co. shall have the right to and may at once and without notice take possession of said machines and remove the same as they may think it for their interest to do, and the same as though said Minchin had failed to pay for them as aforesaid.

42 Fifth. It is also agreed that said Abel & Co. may keep said machines insured for one-half their value or cost to said Minchin, to be paid to them in case of loss, and said Minchin agrees to pay all premiums on said insurance.

43 Sixth. When said machines are fully paid for in money said Abel & Co. agree to pass all title therein to said Minchin and give him a full bill of sale therefor, duly receipted.

In testimony whereof the parties hereto have hereunto set their hands and affixed their seals the day and year above written.

WM. H. ABEL & CO. [L. S.]
JAMES T. MINCHIN. [L. S.]

"C."

Additional Parts to Machines and Repairs.

1880.		
Nov. 30		3 20
Dec'r 31		1 00
1881.		
Feb'y 28		49 25
M'ch 12		5 20
April 30		82 75
Jun. 7.	Ex. p'd on m'ch's	19 50
30		750 00
July 31		2,000 00
Aug. 24		2 00
Sept. 30		12 50

44 "D."

Discounts Paid on Notes.

1880.		
Oct.		18 95
Nov. 20		25 50
" 24		32 50
Dec'r 20		11 00
30		25 00
1881.		
Jan'y 22		12 67
Feb'y 22		5 48
Ap'l 9		8 25
9		9 30
May 17		7 33
17		11 36
26		7 61
6		19 85
June 7		19 87
		17 70
		112 91
29		10 33
July 6. Pro. on M. note		1 25
		11 00
Oct. 11. Exp. on note		2 74
Dec'r 13. do.		4 08
Aug. 12		23 58

45 *Exhibits.*

"NEW YORK, *Nov.* 13, 1880.

"Mr. H. W. Boardman.

"DEAR SIR: Enclosed find two notes for $650 each, as you requested, on ac. Intended to have got them off yesterday a. m., but couldn't find the indorser until to-day. Hope you will get them in time to serve you.

"Why don't you send 'heeler?' We are waiting, and of course cannot do much until we get it. Also send us at once a few hooks for all the setting-up combs sent us.

"Truly, y'rs, "J. T. MINCHIN."

MARION, N. J., 4 | 11, 1881.

H. W. Boardman, Esq.

D'R SIR: Please send receipt for last notes sent, and be kind enough to send me the following information:

How fast does main cylinder run on cords?
How fast does picker run?
" " " duster run?
" " " switcher run?

46 Am moving my cords and jacks here, so as to be handy, and will be in good running order May 1st.

Truly, y'rs, J. T. MINCHIN.

Wired Norris this a. m. to come along, as I'm slightly mixed.

MARION, N. J., 4 | 27, 1881.

Mess. Wm. H. Abel & Co.:

Will you please attend to the extending of those notes for me as per agreement. I find I have got all I can attend to besides them; you know when I last saw you that you said to give you plenty of notice. Hoping everything will be O. K.,

I remain, yours, truly, J. T. MINCHIN.

LACONIA, *June 22d*, '81.

Mr. Harris.

DEAR SIR: Herewith I enclose check for $2,374.63, and with it statement of ac't to time I last saw you.

47 You will remember when we made the three notes of 1,522.03 ea., they were supposed to cover our ac't from and outside of notes given by Minchin, and 3,091.20 of notes to be renewed, to wit, Dec. 23, 6 mos., 500; Jan'y 5, 6 mos., 8500; Jan'y 8, Dec'r 28, 6 mos., 241.20; same date, $200; [illegible]l 4, 3 mos., 550; Ap'l 5, 3 mos., 550; Ap'l 6, 3 mos., 550. We [illegible] have to pay Hill, Clark & Co. 571, and have taken int. on 3 [illegible]s 525 each, May 2, 4, 11, 3,264, so as to square up Mr. Minchin'- [illegible] and open new one with N. Y. S. M'f'g Co.

I enclose last letter from W. C. & Co. for [illegible] to see what they state, as I wrote to you. We have been put to [illegible]ch annoying labor to fix these matters, because of the oversight [illegible] Mr. M. in making notes as he did, and results following, but hope it is now all over and satisfactory to you.

Yours, W. H. BOARDMAN.

NEW YORK, 22 *June*, 1881.

H. W. Boardman, Esq.

DEAR SIR: Your favor 21st inst. rec'd. I am somewhat surprised that you think I should not pay the "Minchin" note if I had

48 seen it, and I now say that I have neither seen or heard from note until one o'cl'k to-day, when it was presented by the Am. Ex. Bank of this city. I told the bank messenger that I had telegraphed parties to pay the note, and that they should hold it until Saturday, when I should hear from you, and if you had not already paid it I would do so. Please send me word immediately what to do. I have had the check in readiness to pay note ever since it was due, and should have done so to-day had I not telegraphed you to pay and deduct from am't "Colby" check. You can do so now, or send me word and I will pay it. I shall be out of town until Saturday a. m.

Y'rs, &c., WM. J. HARRIS.

NEW YORK, 29 *June*, 1881.

H. W. Boardman, Esq.

DEAR SIR: Encl'd find note $500, 4 mos. Please ack. receipt.

Resp'y, WM. J. HARRIS, *Treas.*

P. S.—Be sure and send me ac. as requested.

49 NEW YORK, 6 *Aug.*, 1881.

H. W. Boardman, Esq.

D'R SIR: Y'r rec'd. Will forward your bill to Mr. Minchin. You told me that the repairs would amount to $100 each machine.

What I want is a statement of your ac. from the beginning, which I hope you will favor me with immediately.

Y'rs, truly, WM. J. HARRIS.

LACONIA, *Oct.* 12, 1881.

Mr. Harris.

D'R SIR: Since writing to you this a. m. we are in receipt of a letter from a m'f'ct'r in Phila. stating your Co. were offering all your hosiery m'ch'y, including our knitting m'ch's, for sale. Of course if you are doing this for us & our interest we are glad to have you do so, subject to our approval. If you are doing it under any assumed title in the m'ch's, you know, or ought to, the consequences. Your Co., as you well know, never had any title in or to any of our
50 m'ch's, or any right to dispose of them or disturb them; & if you offer them for sale, you do it with full knowledge that you have no right to, & must meet the consequences. We only leave the m'ch's there, as things had turned, under the understanding that we should join in selling all, so not to slip up & injure sale of your part or our own, & we are at work on this plan & understanding. If your Co. do not propose or care to do so, advise us, & we will very soon remove the machines. We can sell all of yours & ours to one concern & soon, & for cash, & at much better prices than to split & separate ours from yours.

Please give us a definite answer to this by return of mail, & oblige,

Yours. &c., WM. H. ABEL & CO.

1880.			
Oct. —.	Note, Oct. 9, 3 mos.		$625 00
	" 19, 3 "		625 00
Nov. —.	" Nov. 20, 6 "		650 00
	" " 20, 6 "		650 00
Dec. 16.	" 6 "		550 00
51			
	" 6 "		550
	" 6 "		550
23.	" 6 "		500
1881.			
Jan. 5th.	" 6 "		500
8.	" Dec. 28, 6 "		241 20
8.	" " " 6 "		200
1880.			
Oct. 22.	1 legger		500
13.	Int. on 2 notes		18 95
Nov. 2.	Gussetter		500 00
10.	Legger		500 00
	Footer		500 00

1880.			
Nov.	11.	Footer	$500 00
	30.	Repairs	3 20
	20.	Dis. on note	25 50
	24.	do.	32 50
	12.	Heeler	500 00
Dec'r	1.	Legger	500 00
	2.	Gussetter	500 00
	6.	Legger	500 00
	10.	do.	500 00
	11.	do.	500 00
	30.	Cash	163 68
	31.	Repairs	1 00
	20.	Dis. on note	11 00
	30.	Dis. " "	25 00

52

1881.			
Jan'y	22.	" "	12 67
Feb.	28.	Repairs	49 25
	22.	Dis. on note	5 48
M'ch	12.	"	5 20

Mr. Harris, Treas.

DEAR SIR: After waiting two days for our bookkeeper (who had to be in bank this month) to make out Mr. M.'s ac't, I send herewith minutes from ledger, which, — what you have, covers time since Mr. M. left Lake Village. If this does not meet your requirements, advise us.

Yours, &c., WM. H. ABEL & CO.

Laconia, Aug. 11, 1881.

J. T. MINCHIN TO WM. H. ABEL & CO. DR.

1880.			
Nov.	29.	To supplies	320
Dec.	2.	" "	100
1881.			
Feb'y	8.	" "	4,925
M'ch	12.	" "	520
Apr.	5.	" heeler No. 331	500
	"	" footer 333	500

53

	"	" " 334	500
	14.	" " 341	500
	23.	" " 343	500
	30.	" " 347	500
	"	" supplies	82 75
	"	" discount on notes	58 53
May	6.	" footer No. 350	500
June	6.	" " 355	500
	7.	" " 356	500
	"	" discount on 3 notes, 525 ea., May 2, 4, 11	32 64
	22.	" note Hill, Clark & Co., 566.77, & int. & ex.	571 00

June	22.	To dis. & com. on 3 notes, 1,522.03, 1,522.03, 1,522.05						$112	91
								5,416	48
	"	"	check					2,374	63
								7,791	11

CR.

Apr.	9.	By note,	Apr.	4,	3 mos.			550
	"	"	"	5,	3 "			550
	"	"	"	6,	3 "			550
May	2.	"	May	2,	3 "			525
	"	"	"	4,	3 "			525
	"	"	"	11,	3 "			525
June	—.	"	Apr.	1,	6 "			1,522 03
		"	"	5,	6 "			1,522 03
		"	"	10,	6 "			1,522 05
								$7,791 11

54 UNITED STATES OF AMERICA, *District of New Jersey,* } ss:

I, S. D. Oliphant, clerk of the United States circuit court in and for the district of New Jersey, in the third circuit, do hereby certify the foregoing to be a true transcript of the judgment and proceedings in the said entitled cause as the same remains on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Trenton, in said district, this seventh day of October, A. D. 1882.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT, *Clerk.*

55 Supreme Court of the United States. Of the October Term, in the year of our Lord one thousand eight hundred and eighty-two. In Error.

HENRY W. BOARDMAN, Surviving Partner of the Late Firm of Wm. H. Abel & Co.,

vs.

JOHN J. TOFFEY.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Henry W. Boardman, surviving partner of the late firm of Wm. H. Abel & Co., by James B. Vredenburgh, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said John J. Toffey against the said Henry W.

Boardman, surviving partner as aforesaid, whereas by the law
56 of the land the said judgment ought to have been given for the said Henry W. Boardman, surviving partner as aforesaid, against the said John J. Toffey; and the said Henry W. Boardman, surviving partner as aforesaid, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

JAMES B. VREDENBURGH,
Attorney for Plaintiff in Error.

[Endorsed:] U. S. Supreme Court. '82, October term. No. 1133. Henry W. Boardman, surviving partner, &c., *vs.* John J. Toffey. In error. Assignment of errors. James B. Vredenburgh, att'y. Filed 6th Nov., 1882. Office Supreme Court U. S. Filed Nov. 6, 1882. James H. McKenney, clerk.

57 Supreme Court of the United States.

HENRY W. BOARDMAN, Surviving Partner of the Late Firm of Wm. H. Abel & Co.,
vs.
JOHN J. TOFFEY.

And afterwards, to wit, on the second Monday of October, in October term, in the year of our Lord one thousand eight hundred and eighty-two, the said John J. Toffey, by Eugene Stevenson, his attorney, freely comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judicature, before the Justices thereof, now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned in error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EUGENE STEVENSON,
Attorney for Defendant in Error.

58 [Endorsed:] U. S. Supreme Court. Henry W. Boardman *vs.* John J. Toffey. Joinder in error. Eugene Stevenson, att'y for def't in error, Paterson, N. J. Supreme Court U. S. 1882, October term. No. 1133. Henry W. Boardman, surviving partner, &c., pl'ff in error, *vs.* John J. Toffey. Joinder in error. Filed 6 Nov'r, 1882. Office Supreme Court U. S. Filed Nov. 6, 1882. James H. McKenney, clerk.

Endorsed on cover: New Jersey C. C. U. S. No. 158. Henry W. Boardman, surviving partner of the firm of William H. Abel and Company, plaintiff in error, *vs.* John J. Toffey. Filed 1st November, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

HENRY W. BOARDMAN, Plaintiff in Error,
vs.
JOHN J. TOFFEY, Def'd't in Error. } No. 158.

It is hereby stipulated that the record from the court below filed in this cause be amended by adding thereto certified copies of the papers upon the proceedings, removing said cause into the circuit court of the United States for the district of New Jersey from the supreme court of said State, said papers having been omitted from said record by mistake, and that this cause be heard after the filing of said amendment to the record, as if the said amendatory matter had been a part of the said original record filed, and were printed therewith.

Dated Oct. 19, 1885.

PRESTON STEVENSON,
Attorney and Counsel for Def'd't in Error.
JAMES B. VREDENBURGH,
Att'y of Plaintiff.

[Endorsed:] U. S. Supreme Court. Henry W. Boardman, pl'ff in error, *vs.* John J. Toffey, def'd't in error. Stipulation.

In the Supreme Court of the State of New Jersey. In Case.

WILLIAM H. ABEL and HENRY W. BOARDMAN, Plaintiff,
vs.
JOHN J. TOFFEY, Defendant.

To the Supreme Court:

Your petitioner, John J. Toffey, respectfully shows to this honorable court that this action is now pending in this court between the above-named plaintiff therein (they being at the commencement of the action and now citizens of the State of Massachusetts) as sole plaintiffs, and your petitioner herein (he being then and now a citizen of the State of New Jersey) as sole defendant, to recover the value of certain personal property alleged by said plaintiffs to belong to them and to have been wrongfully converted by your petitioner to his own use; that said alleged ownership of property and conversion thereof are in controversy between said plaintiffs and your petitioner in said action, and the matter and amount in dispute therein exceeds the sum or value of five hundred dollars exclusive of costs.

And your petitioner further shows that the venue in this action

is laid in the county of Hudson; that the terms of this court, as well as that of the Hudson county circuit court at which said action could be or could have been first tried, is the next ensuing term of each of said courts respectively; and your petitioner offers herewith a bond with good and sufficient surety for his entering in the circuit court of the United States in and for the district of New Jersey on the first day of its next session a copy of the record in this action, and for paying all costs that may be awarded by the said circuit court in case said court shall hold that said action was wrongfully or improperly removed thereto.

Wherefore your petitioner prays this honorable court to accept this petition and the said bond, and to proceed no further in this action; and to cause the record herein, *i. e.*, a copy thereof, to be removed into the said circuit court of the United States for the district of New Jersey, as prescribed by the statute in such case made and provided. And your petitioner, as in duty bound, will ever pray, &c.

JOHN J. TOFFEY,
By PRESTON STEVENSON,
His Attorney.

STATE OF NEW JERSEY, }
County of Passaic, } *ss:*

PRESTON STEVENSON, being duly sworn, says: That he is the attorney for John J. Toffey, the defendant and petitioner above named; that deponent has read the foregoing petition, and that the same is true, as he verily believes.

PRESTON STEVENSON.

Sworn to before me, this 2nd day of March, A. D. 1882.
JAMES F. STEWART,
M. C. C. of N. J.

(Endorsed:) Supreme court of New Jersey. W. H. Abel and H. W. Boardman, plaintiffs, *vs.* John J. Toffey, defendant. In case. Petition. Preston Stevenson, def'd't's att'y. Paterson, N. J. Filed M'ch 4, 1882.

Know all men by these presents that I, John J. Toffey, principal, and we, James Jackson and William A. Butler, as sureties, are held and firmly bound unto William H. Abel and Henry W. Boardman in the sum of five hundred dollars ($500), lawful money of the United States of America, for the payment of which sum well and truly to be made we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents:

Whereas the said John J. Toffey, as defendant, in a certain action now pending in the supreme court of the State of New Jersey, wherein the said William H. Abel and Henry W. Boardman are plaintiffs, has petitioned the said court for a removal of said action into the circuit court of the United States for the district of New Jersey:

Now, therefore, the condition of the foregoing obligation is such

that if the said John J. Toffey shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in the said action, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said action was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said circuit court in the said action, if special bail was originally required therein, then this obligation shall be void; otherwise, to be in full force and virtue.

Witness our hands and seals, this twenty-fifth day of February, in the year A. D. 1882.

JOHN J. TOFFEY. [SEAL.]
JAMES JACKSON. [SEAL.]
WM. A. BUTLER. [SEAL.]

Sealed and delivered in presence of—
(As to John J. Toffey)
WILLIAM W. LACKEY.
(As to James Jackson and Wm. A. Butler)
NORTON CLARK.

STATE OF NEW JERSEY, }
County of Passaic, } *ss:*

James Jackson and William A. Butler, two of the subscribers to the foregoing bond, being duly, severally sworn, say, and each for himself says, that he is a resident and freeholder in the State of New Jersey, and is worth the sum of one thousand dollars over and above all his debts and liabilities, and exclusive of property exempt by law from execution.

JAMES JACKSON.
WM. A. BUTLER.

Subscribed and sworn to before me, this 25th day of February, A. D. 1882.

[SEAL.] ALBERT A. WILCOX,
Notary Public of New Jersey.

[Endorsed:] New Jersey supreme court. William H. Abel and Henry W. Boardman, plaintiffs, *vs.* John J. Toffey, defendant. In case. Bond. Preston Stevenson, def'd't's att'y. Paterson, N. J. Filed M'ch 4, 1882.

UNITED STATES OF AMERICA, }
District of New Jersey, } *ss:*

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify the foregoing to be true copies of the petition and bond on removal of said entitled cause from the New Jersey supreme court to the said circuit court as fully as the same remain on file and of record in said clerk's office.

Witness my hand and official seal, at Trenton, in said district, this third day of November, 1885.

[The seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT, *Clerk.*

[Endorsed on back:] Supreme court U. S. 1885. October term. No. 158. Henry W. Boardman, surviving partner, &c., pl'ff in error, *vs.* John J. Toffey. Stipulation of counsel & addition to record. Office Supreme Court U. S. Filed Nov. 4, 1885. James H. McKenney, clerk.

117-271

Office Supreme Court U. S.
FILED.
DEC 8 1885
JAMES H. McKENNEY.
CLERK.

J. J. Griffiths, Printer, 38 Montgomery St., Jersey City.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

No. 158.

Henry W. Boardman, surviving partner, &c.,
Plaintiff in Error,

vs.

John J. Toffey,
Defendant in Error.

In Error to the U. S. Circuit Court for the District of New Jersey.

BRIEF FOR PLAINTIFF IN ERROR.

James B. Vredenburgh,
Of Counsel.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

No. 158.

HENRY W. BOARDMAN, surviving partner, &c., *Plaintiff in Error,* *vs.* JOHN J. TOFFEY, *Defendant in Error.*	*In Error to the U. S. Circuit Court for the District of New Jersey.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

William H. Abel and the plaintiff Henry W. Boardman were partners under the firm name of William H. Abel & Co., and engaged in the manufacture of patent knitting machines at Laconia, New Hampshire.

The New York Silk Manufacturing Company being then manufacturers of silk goods at Marion, New Jersey, determined about September, 1880, to go into the manufacture of woolen hosiery and to use the machines manufactured by the plaintiffs. For the purpose of making better terms with Abel & Co., and to get the machines more quickly than they would if dealing in their own

name, they sent one James T. Minchin, a stockholder and director of their company and superintendent of their factory, to Laconia. (printed page 10, 11 ; original p. 25, 26.)

Minchin represented to Abel & Co. that he was to have one of the floors in the Silk Company's factory at Marion to carry on the knitting business on his own account (pr. p. 6 ; or. p. 12) and entered into an agreement in his own name with Abel & Co.

By this agreement (pr. p. 15 or p. 39) Abel & Co. agreed to furnish to Minchin such knitting machinery as he might need at certain prices mentioned in the agreement, said machines to be furnished from time to time as said Minchin might desire and order ; and Minchin agreed that he would pay for the machines as follows : one-fourth in three months from delivery ; one fourth in nine months from delivery, and the remaining one-fourth in twelve months from delivery with interest ; and Minchin was to send to Abel & Co. his notes endorsed by the silk company. These notes, Abel & Co., were to have discounted and retain the proceeds for their own use, Minchin to pay the discount.

And it was understood and agreed that said notes were not to be received by Abel & Co., and were not to be considered by either party as in any way or degree paying for said machines, unless and until all of said notes were fully paid, together with any and all discounts, interest and expenses growing out of them or any of them. And it was understood and agreed that all of said machines were to be and remain the sole property of Abel & Co., until all were paid for in money. Said Minchin was not to have or acquire any title or interest in them or any of them, either legal or equitable ; and that in case Minchin should fail to pay for the machines as and at the times above stipulated said Abel & Co. should have the right to and might without notice take and remove said machines, and dispose of them as they might see fit ; and without accounting to Minchin for any payments he might have made thereon or being in any way liable to

him for said payments or for removing said machines; and if at any time said machines were attached or any attempt should be made by any creditor of said Minchin to take or acquire any lien thereon, said Abel & Co. should have the right to and might at once and without notice take possession of said machines and remove the same, as they might think it for their interest to do, and the same as though Minchin had failed to pay for them as aforesaid.

Abel & Co. might keep same insured, Minchin to pay the premiums.

When said machines were fully paid for in money, Abel & Co. agreed to pass all title therein to Minchin, and give him a full bill of sale therefor duly receipted.

Under this agreement Abel & Co. furnished twenty-one machines; twenty were shipped to Minchin, the last one (on June 17, 1881,) to the Silk Company.

Minchin sent to Abel & Co. his notes—in all seventeen—endorsed by the Silk Company in payment.

Seven of Minchin's notes (pp. 7–8) came due around June 15, 1881.

These notes were renewed by three notes given by the Silk Company and endorsed by Abel & Company for $1522.03, $1522.03 and $1522.05 respectively, @ 6 months each, (pr. p. 7, or. p. 16), dated respectively April 5, 10 and 12, 1881.

These new notes were discounted the proceeds sent to Abel & Company, who in turn sent them, after deducting another note, made by Minchin and unpaid, to William J. Harris, the treasurer of the Silk Company.

The Silk Company subsequently gave Abel & Company three smaller notes for the last machine and for alterations.

These three notes of $1522.03, $1522.03 and $1522.05, and the smaller notes made thereafter were not paid by the Silk Company. pr. p. 9, or. p. 21; pr. p. 13, or. p. 35

The negotiations for the renewal or extension of the notes was carried on by Henry W. Boardman, a member of the firm of Abel & Company for them and William J. Harris, treasurer of the Silk Company for the Silk Company.

Boardman acted with the Silk Company, treating it as indorser on Minchin's notes and ignorant of any interest it had in the machines. Minchin was not present.

Something was said between them about the company taking Minchin's business. Mr. Boardman testifies (pr. p. 8 or. p. 19) that Harris said that he had been talking with Minchin about the company buying Minchin's hosiery business and asking what he (Boardman) thought of it, and Boardman said it was a good business, if well managed. Harris then asked what they (the Silk Company) could do with Abel & Company, if the Silk Company bought Minchin's business, and Boardman said "we will do the same with you as we have with Minchin," and Harris said that would be perfectly satisfactory, he could not expect anything better.

Harris was called by defendant, and his testimony on (p. 12, or. p. 30) is that he said nothing about buying the business; that he had said that the company was dissatisfied with the way Minchin has managed the business, and that they were going to take charge themselves.

Both witnesses agree that nothing was then said about what the terms of the contract with Minchin were. Boardman says (pr. p. 7, or p. 15) he supposed they knew all about it.

Boardman testifies (pr. p. 9 orig. p. 19; pr. p. 15, orig. p. 32), that he never had any idea or intimation that the company claimed to be in any way interested in the hosiery business until the trial.

Harris admits (pr. p. 12, or. p. 30) that he knew Abel & Company supposed Minchin was the only one interested in the hosiery business, because Boardman indicated in his conversations with him that such was their understanding and that he did not correct the impression.

Harris testifies that he never knew of the written contract and that Minchin had no authority to make it.

On October 12, 1881, Abel & Company wrote Harris that they had heard the company were offering all their hosiery machinery for sale and their knitting machines among them, and warned them (p. 19, orig. p. 49, 50).

On the 3d of October, 1881, the defendant as sheriff of the County of Hudson, by virtue of writs of foreign attachment at the suit of The Second National Bank of Paterson, N. J., against The New York Silk Manufacturing Company, issued out of the Circuit Court of Hudson county, seized the said twenty-one machines. (p. 9.)

On the tenth day of January, 1882, Abel & Company served demand on the defendants to be put in possession of the goods (pp. 9, 10), and on the demand being refused brought this suit in trover in the New Jersey Supreme Court.

This suit was removed by defendant to the United States Circuit Court for the District of New Jersey.

While pending there before trial William H. Abel died and the suit continued in the name of the plaintiff as surviving partner.

The case was tried before his Honor John T. Nixon, D. J., March Term, 1882, without a jury, (same having been waived by consent in writing duly entered) and judgment given for defendant.

Specification of the Errors Relied Upon.

I. As to evidence by the plaintiff on re-direct examination.

(1.) Mr. Boardman was asked, "Had you any idea that by accepting these notes—meaning the three notes for $1522.03, $1522.03 and $1522.05 respectively—you parted with the title to your property, these machies in question?"

This question was overruled and excluded by his Honor and an exception taken.

(2.) Mr. Boardman was further asked by plaintiff, "Did Mr. Harris by any expression or action on his part lead you to understand that by taking these notes you parted with the title to your property?"

This question was also overruled and excluded by his Honor, and an exception taken.

The substance of the testimony offered which was rejected by the Court was that there was nothing said or done by the silk company, or Harris acting for it, to or in the presence of Boardman at the time of the renewal of the notes to indicate to Boardman that the silk company was acting otherwise than merely to protect itself as endorser on Minchin's notes, or that it claimed any interest in the machines, or that it might do so by reason of the transaction, or that it had changed its status in the matter by this transaction. And that there was nothing said or done that could impute such knowledge to Abel & Co. as to estop them from asserting their right to reclaim such machines.

The plaintiffs insist that this ruling was erroneous.

II. As to Refusals to Find.

(1.) The plaintiff, at the close of the case, requested the Court to find

That James T. Minchin had authority from the silk company as their agent, and did within the scope of his authority enter into said contract with the said plaintiffs and that the company was bound by said contract.

The Court refused so to find, and plaintiff excepted.

The plaintiffs claim that this is error.

That as the Silk Company had permitted Minchin to act as principal and get the machines in his own name, and knew that Abel & Company supposed him to be acting for himself alone, they were bound by any contract he might make. The Court should so have found and the refusal so to find is error.

(2.) The plaintiff further requested the Court to find.

That said Abel & Company did not waive the conditions of the contract, and did not waive their right to reclaim said machines.

The Court refuses so to find and p aintiff excepted.

Plaintiff claims there is error in this because there is no evidence of any act or omission by the plaintiff, Abel & Company, upon which the Court can find such waiver.

The Court should have so found and the refusal so to find is error.

(3.) The plaintiff further requested the Cout to find:

That said plaintiffs had not by any act or neglect on their part estopped themselves from asserting their claim to said machines.

The Court refused so to find and an exception was taken.

The plaintiffs claim there is error in this because there was no evidence to warrant the Court in finding an estoppel. As to the Silk Company there was no estoppel because there was no representation or concealment by Abel & Company towards them of a material fact; or if there was such misrepresentation or concealment it was not made by Abel & Company with knowledge of the facts i. e. the claim of title by the Silk Company, or can the Silk Company claim ignorance of the truth, i. e. the

actual contract between Minchin and Abel & Company, they having permitted him to act as agent. Nor was such misrepresentation that the Silk Company should act upon it; nor was the Silk Company induced to act upon it.

As to the creditors of the Silk Company there was no estoppel, (1) because there would have been none against Minchin's creditors by letting Minchin have possession of the goods under this contract, and the Silk Company's creditors can claim no more rights than the creditors of Minchin could; and (2) having dealt with Minchin alone and not the Silk Company the plaintiffs could not be held to have given that the burden of proof to show such estoppel was on the defendant and no such estoppel was shown by him the Silk Company, a false credit.

The Court should have so found and the refusal so to find is error.

(4.) And plaintiff further requested the Court to find, "That the New York Silk Company and James T. Minchin had not complied with the requirements of said contract in paying for said machines, and that the title to the same remains in and did not pass from the plaintiffs.

The Court refused so to find and plaintiff excepted.

The plaintiff claims there is error in this because neither by the taking and discounting of the three notes of the silk company nor in any other manner did plaintiffs receive payment for the said machines, and the title to the same did not pass from the plaintiffs.

The Court should have so found, and the refusal so to find is error.

(5.) The Court did find, decide and adjudge upon the pleadings and evidence in the cause that the defendant John J. Toffey, was not guilty of the trespasses alleged against him in the declaration or any of them, and that

the plaintiff Henry W. Boardman should take nothing by his said suit, and that said defendant should have judgment in this action upon the merits thereof against the said plaintiff including his costs to be taxed by the clerk.

The plaintiff excepted to the judgment, and claim that the judgment is erroneous because the Court should have on all the facts in the case given judgment for the plaintiff against the defendant for the value of the machines in question with interest at the time of the demand, from the date of the demand and costs.

Brief of the Argument.

I.

What title did Minchin get to the machines?

The sale was a conditional sale.

The condition precedent to the vesting of title in Minchin was the full payment for said machines in money.

Such contract gave no title to the vendee till the condition has been fully performed.

Herring vs. Hoppock, 15 N. Y. 409.
Cole vs. Berry, 42 N. J. L. 308.
1 Benj. on Sales (Corbin's Edition,) § 444, note 146, cases cited.

Such was the law of New Hampshire where the contract was made.

Holt vs. Holt, 58 N. H. 276.
Wales vs. Pike, 60 N. H. 447.

And in New Jersey where goods were sent.

Cole vs. Berry; *supra.*

And the legality of such a conditional sale was recognized in this court in

Heryford v. Davis, 102 U. S. 239.

The contract in that case was, by its terms, a bailment, a loaning for hire. In this case it is by its terms a conditional sale. There is no loan or lease. Abel & Co. agree to make and furnish the machines, to take notes for them, but the title is not to pass until they are paid for in money.

Mr. Justice Strong observes (102 U. S. p. 243,) that a mere lease of conditional sale, which did not pass the ownership till the condition should be performed, would not subject the property to levy or sale.

See also Cole vs. Berry, 42 N. J. L. 308.
cited *supra.*

Nor does the case of Hervey vs. R. I. Locomotive Works, 93 U. S. 564, apply.

There is no statute in New Jersey requiring contracts of this kind to be recorded.

II.

Did the silk company acquire any better title than Minchin?

They could not even by bona fide purchase.

Ballard vs. Bengett, 40 N. Y. 314.
Comer vs. Cunningham, 77 N. Y. 391.

Can they acquire a better title than their agent?

The Silk Company did not buy the machines of Minchin in any shape; it did not advance him money on them, it merely took them as being the real principal in the transaction, whatever rights he had under the agreement were its rights.

Minchin acted as principal, and acted as principal by the express direction of the silk company because they thought he could make better terms than they could.

Harris, p. 11 or p. 26.
Boardman, p. 6 or p. 12.

Can they disaffirm this act? Can they get a better title than he got by the contract?

The company is estopped from claiming any title to the machines as against Abel & Co.

It must take the contract as its agent has made it.

The principal must take the contract subject to all equities of third persons who have dealt with the agent as principal.

See Story on Agency, § 419, 420.
Kent's Comm., vol. II, p. 632.
Calais Steamb. Co. vs. Van Pelt's Adm'r, 2 Black, 372.

III.

Can the defendant who stands in the shoes of the silk company claim an estoppel?

(A) Are the plaintiffs estopped as against the silk company.

The essential elements of an estoppel are given by given by Bigelow from analysis of cases.

(1.) There must have been a false representation or concealment of material facts.

(2.) The representation must have been made with knowledge of the facts.

(3.) The party to whom it was made must have been ignorant of the truth of the matter.

(4.) It must have been made with the intention that the other party should act upon it.

(5.) The other party must have been induced to act upon it.

Bigelow on Estoppel, 3d ed. 484.

All these must actually or presumably be present.

Ibid.

I. Was there a false representation or concealment of material facts?

If there was not there can be no estoppel.

There was clearly no false representation.

Was there a concealment. A concealment is wilful silence when the duty is to speak.

What was plaintiff's duty to the silk company? Plaintiff never knew till the trial that the silk company claimed any title to the goods.

The silk company was known only as the endorser on Minchin's notes.

The goods were sold to Minchin, delivered to Minchin and supposed to be used by Minchin and in Minchin's possession.

And there was no intentional concealment at the time of taking the new notes. Boardman said they would make the same terms with the company as with Minchin. Harris did not ask what they were and Boardman was not guilty of neglect in supposing Harris knew of the agreement.

II. But if there was a concealment the plaintiff must have been aware of the fact.

But they never knew the silk company in the matter or that they claimed any title.

III. The silk company (if there was a concealment) must have been ignorant of plaintiff's title.

But they cannot claim to be ignorant as their agent made the contract, and they having permitted their agent to act as principal cannot be permitted to claim ignorance of a contract he has made.

IV. The concealment by the plaintiff must have been deliberately made with the intention to have the silk company act on it.

There was no obligation on the plaintiff's part, or on Boardman's part, to speak to the silk company about it; nor can the silk company, if it is assumed to be the principal, claim any such right. It is chargeable with the same knowledge that its agent has.

The plaintiff never knew the silk company in the matter and could not be charged with such an intention.

Boardman, p. 8 or p. 19.
Boardman, p. 13 or p. 32.
Harris, p. 12 or pp. 31 and 32.

V. The silk company must have acted on it.

But the silk company were never placed in a worse position than they were at the outset. They were liable on the notes as endorsers in the beginning. They paid nothing more to Minchin; nothing more to the plaintiffs. And to claim an estoppel they must have put themselves in a worse position.

Bigelow on Estoppel, 549 ff.

The silk company availed itself of the rights of Minchin to the machines.

It took them as the real principal; it availed itself of the contract. It was already liable thereon. It does not appear that the company was induced to pay the notes itself or that it lost any rights against Minchin by supposing that it had the title to the machines. The burden to show detriment would be on the defendant setting up the estoppel, and where no such detriment is shown the estoppel cannot be maintained.

(B) Is the plaintiff estopped as against the defendant representing the attaching creditors of the silk company.

Under the relationship between the company and Minchin, the company's creditors are clearly entitled to no more rights than Minchin's creditors.

A condition annexed to a sale of goods that the title shall not pass to the vendee until the payment of the price is valid as against the vendee's creditors.

Lewis vs. McCabe (Conn. Sup. Ct. of Errors), Amer. Law Reg. Apr. 1882, p. 217.
Rogers vs. Whitehouse, 71 Me. 222.
Forbes vs. Marsh, 15 Conn. 384.
Cole vs. Berry, 42 N. J. L. 308.
Armington vs. Houston, 38 Vt. 448.
Burbank vs. Croker, 7 Gray 158.

These cases go so far as to even protect the title of the vendee in goods intended to be retailed by the vendee or consumed by him and his family, when such a condition has been annexed.

Have the creditors of the silk company the same right or equal right to claim an estoppel?

The cases, particularly those in Pennsylvania, (Martin vs. Matheol, 14 S. & R. 214, and those following that authority,) which concede the estoppel in such cases, place it on the ground that the vendor gave the vendee a false credit.

(And it is to be noted that Pennsylvania is almost the only State which, in the absence of statute, gives the creditor an absolute title as against the debtor's vendor in such cases.)

Benj. on Sales (Corbin's Ed.) § 446 and notes.
Amer. Law Register, April, 1882.
Note to Lewis vs. McCabe, *supra*, and cases cited.

But there was no privity between Abel & Co. and the Silk Company, and no way in which the intention of giving the Silk Company a false credit could be imputed to them.

The burden of proof to establish an estoppel in this case is on the defendant.

IV.

Did Abel & Company waive the conditions of the contract and their right to reclaim the machines?

By the contract (pr. rec., p. 16 or p. 41) the machines were to remain the property of Abel & Company until fully paid for in money, and that when fully paid for in money they were to pass all title to Minchin and give him a bill of sale therefor duly receipted.

Printed or p. 41, p. 15.

Minchin was to pay in notes endorsed by the Silk Company; Abel & Company to have said notes discounted, retaining the proceeds for their own use.

He gave seventeen notes which were paid, but of these seventeen notes seven were paid by means of money raised on new notes made by the Silk Company and indorsed by Abel & Company (printed p. 7, or p. 16). This is reasonably to be regarded as amounting to the same thing as if Abel & Company had themselves taken up the seven notes (or as if they had never ceased to hold them), and had surrendered them for new ones, that is it amounted to a renewal.

Boardman testified he so understood it. Nothing in Harris' testimony is inconsistent with this. His statement (pr. p. 12) that there was no pledge for specific use is not necessarily so. His statement as to renewal is not so as there was no technical renewal.

Moreover in Boardman's letter of 22 June, 1881, (p. 18) the renewal was made by Harris or the Silk Company.

It is clear that if Minchin had acted in the giving of the new notes instead of the Silk Company, it would not have been such a payment of the notes as would have passed the title to him.

The company was already liable as indorsee on the old notes, and it is clearly shown that they acted in the matter to protect themselves.

Boardman (p. 6, orig. p. 14; p. 8 orig., p. 19).
Harris (p. 11 orig. p. 27; p. 12 orig., p. 30.)

The Company it is admitted was to pay the new notes at maturity (Harris p. 12 or p. 30).

So far as Boardman knew, the company was protecting its interest as endorser. It had given no notice that it claimed title.

In fact at that very time, Harris still carrying out the deceit on Abel & Co. of letting Minchin pose as agent, spoke of an intention of taking Minchin's hosiery business off his hands.

Was then taking these new notes a payment in money of the old ones so as to pass title?

It has been held in this Court that a promissory note does not discharge the debt for which it was given unless such be the express agreement of the parties. It only operates to extend until maturity the period for the payment of the debt. The creditor may return the note when dishonored and proceed upon the original debt.

"The Kimball" 3 Wall. 37, 45.

The rule is the same as to renewals.

"The giving up of one promise to pay, on taking another from the same party, is but a continuation of the promise and the giving of further time to perform it. As the first did not pay the debt, the other does not redeem the promise of the first, nor itself pay the debt."

Folger, J., in Jagger Iron Co. v. Walker, 76 N. Y. 521.

Did these new notes pay for the machines in money?

Even admitting that Minchin was released from personal liability by the taking of the new notes the machines were not to pass until all were fully paid for *in money*.

The new notes were not money, they could not possibly be money until maturity, and were in fact never paid and never became money.

Abel & Co.'s indorsing and discounting them or the Silk Company's doing so itself on Abel & Co.'s indorsement, did not make them money. It was simply a loan on them from a third party, and Abel & Co. were liable to pay them when they came due and did pay them and were restored to the same financial status as at the time they were taken.

The acceptance of a third party's note for a precedent debt does not make an absolute payment and discharge the debt. The presumption is that such note is given and received as collateral security.

Bayard vs. Shunk, 1 Watts & S. 95.
McIntyre vs. Kennedy, 29 Penna. 448.
Ayres vs. Van Lien, 2 South. (N. J.) 765, (opinion Southard, J. p. 770.)
Hunter vs. Moul, 98 Penna. 13.
Vail vs. Foster, 4 N. Y. 312.

And so decided in this Court.

Peter vs. Beverly, 10 Peters 532.

And these new notes were never paid.

Boardman, p. 9 or p. 21; p. 13 or p. 35.

V.

The machines were never paid for.

This has been embraced in the argument under the last head.

VI.

As to the rejection of the two questions asked Boardman.

(Pr. p. 14 or 36.)

The questions were competent and should not have been rejected.

Harris' understanding, if known to Boardman and acquiesced in by him, would have been admissible against Abel & Co., and evidence to the contrary would then clearly have been competent.

Harris' testimony (Pr. p. 12 or 30) having been admitted, Boardman's contradiction should have also been admitted.

James B. Wredenburgh
of counsel with
Plff. in Error

117-271

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 158.

HENRY W. BOARDMAN,
Plaintiff in Error,

vs.

JOHN J. TOFFEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Argument for Defendant in Error.

PRESTON STEVENSON,
Of Counsel.

NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU STREET, Cor. FULTON.
1885.

Supreme Court

OF THE UNITED STATES

HENRY W. BOARDMAN
Plaintiff in Error

—*vs*—

JOHN J. TOFFEY
Defendant in Error

On Writ of Error to the Circuit Court of the United States for the District of New Jersey to review a judgment entered after a trial by the Court—a jury having been duly waived. (folios 6-7)

Boardman, as surviving partner of the firm of W. H. Abel & Company of Laconia, New Hampshire, manufacturers of improved knitting machinery, sued Toffey, in the Supreme Court of New Jersey, for the alleged conversion of 21 knitting machines of the value (as proved at the trial) of five hundred dollars each. The defendant pleaded the general issue. The cause was duly removed into the Circuit Court for the New Jersey District upon proceedings showing jurisdiction by reason of the citizenship of the parties.

The conversion complained of was the refusal of the defendant to deliver the said machines to the plaintiff upon a demand therefor served on said defendant in writing on the 10th day of January

1882—said machines being then, and at all times prior thereto and since the 3d day of October 1881, in the possession of the defendant as Sheriff of Hudson County, New Jersey, in the premises occupied theretofore by The New York Silk Manufacturing Company, in Jersey City in said County, by virtue of certain writs of foreign attachment duly issued out of the Circuit Court of said County against the said New York Silk Mf'g Company, at the suit of The Second National Bank of Paterson, a *bona fide* creditor of said company and having no notice of any claim against or to said machines by said plaintiff. (folios 22–24) The plaintiff's claim of title and right to possession of the chattels was based upon an alleged forfeiture incurred under a contract for a conditional sale of the machines which reserved the title in plaintiff until full payment of the purchase price, and in the event of non-payment gave plaintiff the right to immediate possession of the property. (folios 39–43)

The Court found generally for defendant upon the issues raised and ordered judgment accordingly. (folios 10–11)

The plaintiff's case, as testified to by him at the trial, is that he shipped twenty of the machines in question from Laconia, New Hampshire, to one James T. Minchin, at the factory of The New York Silk Company, Marion, Jersey City, New Jersey, under a certain contract for a conditional sale of the machines made with said Minchin in September 1880. These machines were shipped from time to time as ordered by Minchin between October 22d 1880 and June 7th 1881, and were all $500-machines according to the prices named in said contract. (folios 12–13) That Minchin sent his notes to plaintiff from time to time for purposes of discount and appropriation of proceeds in payment of the machines. They were endorsed by The New York Silk Co. as

provided in the contract, and in amount covered all machines shipped (fol. 15); but were not sent at once on delivery of a machine as stipulated for, (folio 40) but from time to time on account (fol. 14); that these notes to the extent of $5,775 were paid, but no more, the balance having been "renewed" and left unpaid (folio 17); that the notes "renewed" amounted to $3091.20 and were "renewed" by the *individual notes* of The New York Silk Company by virtue of an arrangement made between plaintiff and that company through Mr. Harris, its Treasurer. These "renewal" notes amounted to $4566.11, and were discounted through a broker, a friend of plaintiff, and the proceeds, after deducting the amount of plaintiff's account against Minchin *outside of notes given by him*, were remitted by plaintiff to The New York Silk Company, (folio 18 and letter at folios 46–47); that Minchin's notes "renewed" by said notes of the Silk Company were not due when the said arrangement was made (June 15, 1881), and were not surrendered up at that time, but were then outstanding, having been discounted or deposited for collection by plaintiff according to the agreement with Minchin. Plaintiff never again had them in his possession, and he received the value of them by discount or collection at maturity. They were all paid in due course (folio 21); that the three notes of the Silk Company discounted through the broker as before mentioned were not paid—the company having failed before they matured (folio 20); that the 21st machine was shipped direct to the New York Silk Company on June 17th 1881, and plaintiff received the Silk Company's own note for the price ($500—) dated the 29th of the same month (folios 13, 21). This note was also left unpaid by the Silk Company, as well as two others given by the company for $578^{09} and $578^{10} respectively, dated August 12, 1881, but for what consideration plaintiff does not show; that

these last six notes *made by the New York Silk Company* were the notes unpaid in payment of the machines ordered under Minchin's agreement of September 1880 for which plaintiff claimed a forfeiture under the contract and the possession of the machines (folios 14, 16–17, 20–21)

Plaintiff further testified that he never showed or mentioned the agreement made with Minchin to Mr. Harris, the treasurer of the Silk Company; that he had it with him at the time Mr. Harris made the arrangement of June 15, 1881 but did not show it to him, and never informed him of it. Supposed he know all about it. Saw Mr. Harris several times after Minchin's first note (which was protested) came due, but never mentioned the agreement, and never stated the terms on which the machines had been shipped to Minchin; and this too although Mr Harris at the time of the arrangement of June 15, 1881, asked plaintiff for a statement of Minchin's account with plaintiff in respect of the machines. (folios 14–15. 21–22.)

So far as plaintiff knew, the Silk Company and Mr. Harris were in entire ignorance of the agreement with Minchin (folio 15) although plaintiff asserts that "he thought" they knew about it (Id) Plaintiff says also that he never had any "idea or intimation" that the Silk Company was interested in the business in which Minchin used the machines in question until Mr. Harris testified to that effect in this cause. (folios 19–20) Says further that, in procuring the discount of the Silk Company's three notes before mentioned, he had no intention to make a substitution of parties or of the terms of the contract with Minchin, or to pass any title in the machines to the Silk Company, or to divest plaintiff of his title to *all* the machines (fol 20)

The defendant proved by Mr. Harris, a director and the Treasurer of the Silk Company, the follow-

ing facts and they are not contradicted by plaintiff in any way—viz, that the New York Silk Manufacturing Company decided in September 1880 to go into the manufacture of hosiery, and to use the "Abel" machines; that Minchin, who was also a director in the company and the superintendent of the factory, said that he had had business dealings with Abel & Company and that they were friendly to him and that he could get the machines on better terms if he bought them in his own name; that the Company agreed to his suggestion and sent him on to buy the machines; that he returned and stated that he had bought them in his own name, payment to be made in three, six, nine and twelve months by his own notes endorsed by the Company; that Minchin's authority was to purchase the machines; he had no authority from the Company to make the agreement of September 25, 1880, which it is shown he did make, nor did the Company know of that agreement, or that Abel & Company claimed to have title to or lien on the machines until after the Company's failure in September 1881, (folios 25–27, 29); that the Company endorsed all the notes given by Minchin for the machines; that they were protested for non-payment from time to time—the Company not having a record of their times of payment, the dates having been inserted by Minchin; that to avoid further trouble the Company decided to take the charge of the hosiery business from Minchin and to carry it on directly itself, and attend to paying Minchin's notes at maturity; that plaintiff was so informed at the Company's office and expressed his satisfaction with that arrangement; (folios 27, 30) that a number of Minchin's notes were about maturing in June 1881, all close together; and, after the said statement to him of the Company's intentions, the plaintiff offered to assist the Silk Company to raise funds to meet the outstanding notes made by

Minchin as they matured; that this was done through a note broker, (as testified to by plaintiff) Mr. Harris giving the three notes of the company, [called "renewal" notes by plaintiff] to Mr. Colby, the broker, who took them and sold them or had them discounted—[the notes not being in plaintiff's possession at all]—and sent proceeds to Abel & Co. who deducted something due by Minchin—one note already due (and evidently also other items, as testified by plaintiff, but the defendant's witness is not specific) and remitted the balance to the Silk Company, who deposited and used it for its ordinary business purposes; that the Minchin notes were all paid as fast as they subsequently matured; that the proceeds of the three notes so discounted for the Company were not held for the special purpose of paying Minchin's notes, but said notes were paid at maturity out of the Company's general funds; that all notes given by Minchin were thus paid by the Company (folios 27–29) The three notes of the Silk Company were not discounted with any pledge that the proceeds were to be used to pay the maturing Minchin notes, but as an accommodation to the Company to enable it to pay them as they came due; that nothing was said about "renewing" Minchin's notes; they were not to be "renewed" but to be paid at maturity. Minchin was not a party to the arrangement, which was made between Mr. Harris, for the company, and plaintiff—Minchin not being present. (folio 30). Defendant proved further that after this arrangement and the declaration of the Silk Company's intentions as to the business connected with the machines, *the Company ordered* one machine—the 21st held by defendant in this suit—and gave *its own note* for it, *at four months*, dated June 29th 1881. (folio 29 and see letter at bottom of page 18). Subsequently, in August 1881, the Company gave the two

other notes mentioned in plaintiff's testimony—viz for $578.09 & $578.10. They were given "in compromise and settlement" of a large bill rendered by Abel & Co. for *alterations* to the machines amounting to $2750.00. [It is clear that this bill was for alterations *to all* the machines—see letter from Mr. Harris of Aug. 6. 1881. fol. 49] [See items of this bill under date of June 30 & July 31 in Exhibit C—introduced by plaintiff p. 16] The Company disputed this bill as excessive, and it was settled by giving the two notes referred to. These notes were given in payment and settlement of the entire balance of account with plaintiff at the time. (folio 29)—

[There is no proof, by either party, of any further transactions between plaintiff's firm and the Silk Company or Minchin]

The defendant in error respectfully submits for grounds to sustain the judgment and without regard to the order in which errors may be assigned in the brief of plaintiff—

I.

There is no exception in the case available to the plaintiff but those (2) to the exclusion of evidence found at folio 36.

The finding of the Court is general (folios 8–10); and therefore neither the exception formally taken to the finding itself nor those taken to *refusals* of the Court to find as requested by the plaintiff (all the latter being upon points necessarily involved in the general finding), (folios 37–38) can be the subject of review by this Court.

14 Wall. 484; 18 Id. 237; 19 Id. 65.

There is no special finding of the *facts*—only a report of the *evidence* taken. This does not warrant an examination by this Court into the merits of the judgment. 19 Wall. 70.

But supposing the exceptions referred to to be available, they are not well taken.

a. The exception to the general finding could not possibly be sustained, because the finding is just upon a pure *issue of fact* involved if upon no other ground.

Admitting all that is claimed by plaintiff for the agreement made with Minchin, viz, that it was purely a contract of *conditional sale* and therefore not within the chattel mortgage act of New Jersey, and that, although made without its actual knowledge or authorization, the New York Silk Manufacturing Company and its creditors must be presumed to have knowledge of its terms—the finding of the Court, if construed (as it undoubtedly was intended) as a decision that the condition of the contract upon the performance of which title vested *was fully discharged by payment*, (so far, at least, as the first 20 machines are concerned) is the natural and reasonable, and indeed the inevitable, inference from the testimony adduced. As regards the 21st machine, *which was ordered by the New York Silk Company and for which the Company gave its individual note on 4 months time*, (every circumstance thus being different from those prescribed in the agreement) it is a most natural conclusion (as it is shown that nothing was said about the agreement) that this was the commencement of an entirely new relation between plaintiff and the Silk Company, in no way subject to the conditions and limitations contained in the agreement with Minchin; and therefore the non-payment of this last note by the Company would neither affect the title to the 20

machines previously received through Minchin nor to the last one for which it was given in payment.

Of course the non-payment of the two notes of August 12, 1881 for $578.09 and $578.10 could have no effect whatever upon the title to the machines even under the written contract. Those notes were given for *repairs and alterations* in the machines (fol. 29) ; and plaintiff's attempt to extend the condition of the contract to such obligations serves only to show the reckless spirit in which this litigation was commenced.

b. Plaintiff's *first* request (folio 37) was properly refused on its merits.

1. It is a series of propositions embracing both fact and law, although propounded as a finding of fact. It is therefore improper in form; and, besides, the Court is not bound to find any special fact or facts even upon request (18 Wall. 237).

2. It is entirely immaterial to the decision of the case, in view of the proofs of a full *performance* of the contract. An immaterial error in ruling upon a question of law will not vitiate the judgment. (104 U. S. 618).

3. The refusal was, however, justified by the uncontradicted evidence in the case.

c. The *second* request (folio 37) is subject to the same criticisms—

1. It was a pure question of fact although proposed as a ruling upon the law. (29 Conn 82)

2. It was entirely immaterial to the real ground of decision (*supra*) whether a waiver was proved or not.

3. The refusal was required upon the evidence, which clearly proved a waiver by plaintiff of the

condition of the contract and the vesting of title to the property in the Silk Company. (41 N. Y. 155; Schouler on Pers. Prop. Vol II § 304 *et seq*)

d. The *third* request (folio 38) was equally untenable.

1. It was immaterial to the decision of the case, as we have before argued.

2. If ever a case of estoppel was proved in respect of such a condition of forfeiture it was established in this case. The plaintiff dealt with the Silk Company in the belief that it was but an accommodation endorser on Minchin's notes; and, by refraining from mentioning the true state of the contract between the latter and himself, allowed the Company to continue in its belief that Minchin's purchase of the machines had been absolute, and that his title (or rather the Company's) was good as against the plaintiff. Even if the Company is to be held chargeable with a knowledge of the contract under some circumstances, it would not be where plaintiff was ignorant of the Company's interest in the machines and supposed that Minchin was the purchaser and the Company only the endorser of the notes. The latter having assumed a new and greatly increased obligation upon the faith of the representations of the plaintiff, certainly he will not be allowed to set up a state of facts contrary to those representations, and to the injury of the Company.

e. In the *fourth* request (fol. 38) there is again a commingling of matter of fact with law. The *form* of the request, therefore, is enough to condemn it; and it was also another attempt to compel a special finding on the facts. *Supra.*

But the refusal was right upon the merits. The burden of proof was upon plaintiff to show that a

forfeiture had occurred under the contract. (34 Am. Rep. 631) But the inevitable inference from the evidence is that there was no forfeiture, because the condition as to payment had been fully complied with in respect of all machines ordered under the contract. The notes in the payment of which plaintiff assisted, by aiding the Silk Company to get a loan on the sale of its own notes, were not due when this loan was effected, nor were they surrendered up in exchange for the latter notes. They remained outstanding, having been discounted by plaintiff, and the Silk Company continued bound to pay them, in whosesoever hands found at maturity, as well as to pay the notes discounted through the broker. It paid Minchin's notes as they matured, and they were only extinguished *by payment*. There was no attempt at "renewal." Besides, it does not appear but that the Silk Company might have paid them without any assistance. The assistance was voluntarily offered.

But even if plaintiff's claim of a *virtual* "renewal" of Minchin's notes be well founded (by reason of the fact that he helped to raise the funds to pay them) it would not extend the condition of forfeiture to such a transaction. The contract in question is a most harsh and inequitable one—involving the forfeiture of all sums paid unless the full price of *all the machines* was paid. Such a contract is never favored, and is to be construed strictly; and, if its terms are literally complied with, the Court will hold it sufficient and not extend them by implication. (53 Wisc. 211; 1 Wend. (N. Y.) 388, 395; 9 Hun (N. Y.) 553.)

II.

The exceptions to the exclusion of evidence are not well taken (folio 36).

a. The first question was a grossly improper one.

1. It was leading—

2. It was merely cumulative, if asked to ascertain the *intention* of the witness in his transactions with the Silk Company, for he had already fully testified as to that without objection (see folio 20) 17 How. 6.

3. It was not rebuttal evidence, but, if proper, belonged to plaintiff's case. It was, however, asked in rebuttal, and was properly excluded on that ground, if no other.

4. If the question was directed to the *intention* of the witness, it was entirely immaterial. The intention of a party in doing an act may be inquired of directly in criminal or *quasi*-criminal actions, or in actions *ex delicto* where the intent is the *gravamen* of the charge or ground of complaint or affects the question of damages—*e. g.*—cases of fraud, (14 N. Y. 567; 21 Id. 121; 25 Id. 439; 34 Id. 286;) or actions for a statute penalty (44 N. Y. 22); or involving a statutory liability in the nature of penalty, as usury, (38 N. Y. 281; 81 Id. 363;—but see 50 Id. 437); or if motive or belief is the *factum probandum* (30 N. Y. 625).

In such cases, however, it is only because it is the intent *of the individual party* that is material and upon which the significance of admitted facts depends (and, it seems, because a finding against him imputes wrong-doing; although the case of proving the *residence* of a party is an exception, and it is believed the only one, to this latter qualification)

that he is allowed to testify directly concerning it. But in all cases where the intention is innocent, whatever it may have been, or where the *factum probandum* is *the concurrent intention of two or more parties—e. g.* in all actions *ex contractu*—there the intention must be derived from the contemporaneous acts and declarations of the parties, and the testimony of either as to his intention is altogether immaterial because not evidence of the fact. (1 Wend. (N. Y.) 191 ; 43 N. Y. 231 ; 56 Id. 618 ; 51 Ala. 171.)

New Hampshire cases *contra* are not well-considered. (40 N. H. 395 ; 45 Id. 405 ; 48 Id. 205.)

5. But the question was not directed to the *intention* of the witness in respect of the acts referred to. He was asked as to his "idea" (i. e., opinion or belief) of the legal effect of his own acts. Of course such a question is absurd.

b. The *second* question was, if possible, even more improper than the first.

1. It was leading.

2. It was cumulative, if indeed any fact could have been adduced by it (folio 19).

3. It was not rebuttal testimony.

4. It did not call for the proof of any *fact*, merely the *conclusions* of the witness ; and not satisfied with calling for one conclusion the question asks for a conclusion of the witness upon the conclusion of another person. Such questions are improper both as to form and substance. A witness cannot be asked as to his *understanding* of a state of facts, or of language used by himself or by others.

1 Wend. (N. Y.) 191 ; 18 Barb. (N. Y.) 537 ; 16 Ohio 88 ; 77 N. Y. 461—the latter case very much